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No. 80-2078.

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

DAMES & MOORE, A PARTNERSHIP,
PETITIONER,
v.
DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, AND THE UNITED STATES OF AMERICA,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT BEFORE JUDGMENT.

Motion of Chas. T. Main International, Inc. for Leave to File a Brief as Amicus Curiae and Brief of Chas. T. Main International, Inc. as Amicus Curiae.

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Motion for Leave to File a Brief as Amicus Curiae.

Chas. T. Main International, Inc. ("Main") respectfully moves this Court, pursuant to Supreme Court Rule 36.3, for leave to file a brief as amicus curiae in support of the position of the petitioner, Dames & Moore. Main states the following grounds for its motion:

In 1978 and 1979, Main performed engineering services for Iran's Ministry of Energy and two Iranian government instrumentalities. As of November 1, 1979, these entities owed Main approximately $2.88 million. Main sued Iran and its entities in the District of Massachusetts and the Southern District of New York to recover this amount. Main also sued the Central Bank of Iran for its wrongful failure to cash a payment order. In November 1979, Main obtained prejudgment attachments of defendants' property in the Southern District of New York and the District of Massachusetts and a preliminary injunction restraining the defendants from transferring their assets out of the United States. By virtue of its attachments and preliminary injunction, Main enjoyed full security for its claims.

Pursuant to the "Algerian Declarations" at issue here, President Carter purported to nullify Main's attachments and preliminary injunction, to suspend jurisdiction of Main's claims in the federal courts, and to remit Main to an international arbitral tribunal.

In February 1981, Main sued the United States and certain of its officers in the District of Massachusetts to restrain the application of the Algerian Declarations and implementing executive orders and regulations, insofar as they purported to suspend federal court jurisdiction of Main's claims and to interfere with Main's attachments and injunction. On March 27, 1981, the district court dismissed Main's complaint for failure to state a claim. On May 22, 1981, the First Circuit affirmed that order.

While Main's First Circuit appeal was pending, Main participated in the Second Circuit appeal in which the United States sought a determination as to the validity of the Algerian Declarations. On April 9, 1981, the Second Circuit remanded this issue for district court determination.

Before petitioning this Court for a writ of certiorari, Main determined to await the decision of the Southern District of New York, since Main's Iranian claims are secured principally by attachments in that District. (Main's Southern District lawsuit has been placed on the suspense docket.) On June 11, 1981, that court held in a single test case, *Marschalk Company, Inc.* v. *Iran National Airlines Corporation, et al.*, 79 Civ. 7035 (CBM), that the Algerian Declarations, insofar as they purport to suspend federal court jurisdiction and to interfere with the operation of court orders, are beyond the President's powers under federal statute and the United States Constitution.

On June 11, 1981, this Court granted the petition of Dames & Moore for certiorari before judgment. Since the issues Main would raise in a certiorari petition from the First Circuit's order are now before this Court on Dames & Moore's petition, Main believes that it can most effectively assist the Court in determining these important issues by participating as amicus curiae on this appeal. Main has briefed and argued the issues involved in this case in the First and Second Circuits. In these appeals, Main has focussed on the construction and legislative history of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602 *et seq.*; the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 *et seq.* ("IEEPA"); and the Trading with the Enemy Act, 50 U.S.C. App. §§ 1 *et seq.*, from which IEEPA was derived. In briefing these issues in two Circuits, Main has reviewed the legislative history of these three statutes and the sixty-four years of judicial authority construing the Trading with the Enemy Act. Main believes that

no party can adequately duplicate this research, in view of the expedited schedule and the urgency of a prompt decision, and that its participation as amicus curiae is thus of particular importance. Main addresses only these statutory issues in its proposed amicus brief.

Moreover, as a practical matter, the Court's decision in the Dames & Moore case will determine Main's two actions as well, and Main has no other adequate way of protecting its interest except by participating in this appeal.

Finally, Main's business is to provide engineering services to governments and entities located in foreign countries, including a number of developing countries in the Third World. The resolution of the legal issues involved in this case will have ongoing importance to Main in the conduct of its business.

Counsel for Dames & Moore, Bank Markazi Iran and the Solicitor General of the United States have assented to this motion. Counsel for the Islamic Republic of Iran has not assented to this motion.

For the foregoing reasons, Main respectfully requests that this Court grant it leave to file the attached brief as amicus curiae.

Respectfully submitted,

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Dated: June 19, 1981

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Table of Contents.

Interest of the amicus curiae 1

Summary of argument 3

Argument 4

I. The FSIA was intended by Congress to prevent executive interference with court jurisdiction of commercial claims against foreign governments 4

A. The FSIA was intended by Congress to reverse prior executive practice 4

B. The FSIA confers jurisdiction of commercial claims against Iran 7

C. The legislative history of the FSIA demonstrates conclusively that Congress did not intend any "international emergency" exception to the FSIA 8

II. IEEPA does not permit executive interference with United States litigation or court process 14

A. IEEPA's language provides no authority for executive branch interference with court jurisdiction or remedies 15

B. The legislative history of IEEPA indicates clearly that Congress intended no executive interference with court jurisdiction or remedies 17

C. IEEPA does not give the President greater power in peacetime than TWEA gives him in time of war 20

Conclusion 26

Appendices:

Appendix A — Comparison of Pertinent Sections of TWEA and IEEPA 1a

Appendix B — Pertinent Sections of TWEA for Which There Is No Counterpart in IEEPA 2a

Appendix C — Identification of Parent, Subsidiaries and Affiliates of Chas. T. Main International, Inc. Pursuant to Supreme Court Rule 28.1 7a

Table of Authorities Cited.

CASES.

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 16

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) 6, 10

American International Group, Inc. v. Islamic Republic of Iran, No. 80-1779 (D.C. Cir. decided May 22, 1981, opinion issued June 5, 1981) 16

Avegno v. Schmidt, 113 U.S. 293 (1885) 22

Becker Steel Co. of America v. Cummings, 296 U.S. 74 (1935) 22, 23

Behring International, Inc. v. Imperial Iranian Air Force, 475 F.Supp. 383 (D.N.J. 1979) 8

Central Union Trust Co. v. Garvan, 254 U.S. 554 (1921) 22

Chase Manhattan Bank v. United China Syndicate, Ltd., 180 F.Supp. 848 (S.D.N.Y. 1960) 20

Chas. T. Main International v. Khuzestan Water & Power Authority, No. 80-1027 (1st Cir. May 22, 1981) 2, 16

Church of the Holy Trinity v. United States, 143 U.S. 457 (1892) 14, 15

Citizens' Bank of Louisiana v. United States, 87 U.S. (20 Wall.) 114 (1874) 22

Civil Aeronautics Board v. Delta Airlines, Inc., 367 U.S. 316 (1961) 15

Clark v. Uebersee Finanz-Korporation, A.G., 332 U.S. 480 (1947) 19, 23

Edwards v. Carter, 580 F.2d 1055 (D.C. Cir.), cert. denied, 436 U.S. 907 (1978) 13

Edye v. Robertson (Head Money Cases), 112 U.S. 580 (1884) 12

Electronic Data Systems Corp., Iran v. Social Security Organization of Iran, 79 Civ. 1711 (S.D.N.Y. May 23, 1979), remanded on other grounds, 610 F.2d 94 (2d Cir. 1979) 8

Electronic Data Systems Corporation Iran v. Social Security Organization of the Government of Iran, 508 F.Supp. 1350 (N.D. Tex. 1981), cert. denied, 49 U.S.L.W. 3912 (June 8, 1981) 16

Ex Parte Republic of Peru, 318 U.S. 578 (1943) 5

Farbenfabriken Bayer A.G. v. Sterling Drug, Inc., 251 F.2d 300 (3d Cir.), cert. denied, 356 U.S. 957 (1958) 20

Guessefeldt v. McGrath, 342 U.S. 308 (1952) 15, 20, 23

Hecht Co. v. Bowles, 321 U.S. 321 (1944) 16

Johnson v. Robison, 415 U.S. 361 (1974) 16

Kaufman v. Societe Internationale Pour Participations Industrielles et Commerciales, S.A., 343 U.S. 156 (1952) 23

Kuerschner & Rauchwarenfabrik A.G. v. New York Trust Co., 126 F.Supp. 684 (S.D.N.Y. 1954) 20

Lyon v. Singer, 339 U.S. 841 (1950) 20

Marschalk Co., Inc. v. Iran National Airlines Corp., et al., 79 Civ. 7035 (CBM) (S.D.N.Y. June 11, 1981) 7, 9, 11, 13, 14, 16, 18

Miller v. Robertson, 266 U.S. 243 (1924) 21, 25

National Airmotive Corp. v. Iran, 499 F.Supp. 401 (D. D.C. 1980) 16

New England Merchants National Bank v. Iran Power Generation and Transmission Co., et al., Nos. 1049-1144 (2d Cir. April 9, 1981) 2

New England Merchants National Bank v. Iran Power Generation and Transmission Co., et al., 502 F. Supp. 120 (S.D.N.Y. 1980), remanded, Nos. 1049-1144 (2d Cir. April 9, 1981) 5

Orvis v. Brownell, 345 U.S. 183 (1953) 20

Porter v. Warner Holding Co., 328 U.S. 395 (1946) 16

Posadas v. National City Bank of New York, 296 U.S. 497 (1936) 17

Propper v. Clark, 337 U.S. 472 (1949) 20

Reading & Bates Drilling Co. v. National Iranian Oil Co., 79 Civ. 6034 (S.D.N.Y. Nov. 29, 1979) 8

Republic of Mexico v. Hoffman, 324 U.S. 30 (1945) 5

Rich v. Naviera Vacuba, S.A., 197 F.Supp. 710 (E.D. Va.), aff'd, 295 F.2d 24 (4th Cir. 1961) 5, 6, 10, 16

Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812) 5

Shields v. Schiff, 124 U.S. 351 (1888) 22

Silesian-American Corp. v. Clark, 332 U.S. 469 (1947) 20, 22

Silver v. New York Stock Exchange, 373 U.S. 341 (1963) 16, 17

Stoehr v. Wallace, 255 U.S. 239 (1921) 22

Texas Trading & Milling Corp. v. Federal Republic of Nigeria, No. 644 (2d Cir. April 16, 1981) 9

Turner v. American Baptist Missionary Union, 24 Fed. Cas. 344 (No. 14,251) (C.C. Mich. 1852) 13

United Housing Foundation, Inc. v. Forman, 421 U.S. 837 (1975) 14

Victory Transport, Inc. v. Comisaria General, 336 F.2d 354 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965) 6

Watts, Watts & Co. v. Unione Austriaca di Navigazione, 248 U.S. 9 (1918) 22

White v. Mechanics Securities Corp., 269 U.S. 283 (1925) 5, 15, 16

Whitney v. Robertson, 124 U.S. 190 (1888) 12

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 24, 25

Zittman v. McGrath, 341 U.S. 446 (1951) 20

STATUTES, TREATIES, EXECUTIVE ORDERS, REGULATIONS AND RULES.

22 U.S.C. § 2370(e)(2) 10

Foreign Sovereign Immunities Act (codified at 28 U.S.C. §§ 1330, 1602 et seq.) 3, 4, passim

§ 1330 7

§ 1602 7

§ 1603(a)-(b) 7

§ 1605(a)(2) 7

§ 1606 7

§ 1610(d) 7

50 U.S.C. § 191 16

International Emergency Economic Powers Act (codified at 50 U.S.C. §§ 1701 et seq.) 3, 14, passim

§ 1702(a)(1)(B) 14, 15, 20, 23, 24

§ 1706(a) 18

Trading with the Enemy Act (codified at 50 U.S.C. App. §§ 1 et seq.) 15, passim

§ 5(b) 18, 20, 22, 23, 24

§ 7(c) 21, 24

§ 9 21, 22, 24
§ 9(a) 23
40 Stat. 415 21
40 Stat. 419-20 21, 22
40 Stat. 1020 21
55 Stat. 839-40 22
Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, 8 U.S.T. 899 (entered into force June 16, 1957) 6, 7

LEGISLATIVE MATERIALS.

S. 566, 93d Cong. 1st Sess. (1973) 14
H.R. 3493, 93d Cong. 1st Sess. (1973) 14
H.R. Rep. No. 85, 65th Cong. 1st Sess. (1917) 21
H.R. Rep. No. 94-1487, 94th Cong. 2d Sess. (1976) 4, 6, 8, 10, 11, 13, 14
H.R. Rep. No. 95-459, 95th Cong. 1st Sess. (1977) 16, 17, 18, 19
Hearings before House Subcommittee on International Economic Policy of Committee on International Relations on H.R. 1560 and H.R. 2382, 95th Cong. 1st Sess. (1977) 18, 23
Hearings on H.R. 3493 before House Committee on the Judiciary, Subcommittee on Claims and Government Relations, 93d Cong. 1st Sess. (June 7, 1973) 14
Hearings on H.R. 11315 before House Committee on Judiciary, Subcommittee on Administrative Law and Government Relations, 94th Cong. 2d Sess. (June 2 and 4, 1976) 8, 10, 11, 12, 13

Revision of Trading with the Enemy Act, Markup before the Committee on International Relations, House of Representatives, 95th Cong. 1st Sess. (1977) 17, 19
S. Rep. No. 911, 77th Cong. 1st Sess. (1941) 19, 23
S. Rep. No. 94-1310, 94th Cong. 2d Sess. (1976) 4
S. Rep. No. 95-466, 95th Cong. 1st Sess. (1977) 17, 18, 19
87 Cong. Rec. 9838 (Dec. 16, 1941) 23
87 Cong. Rec. 9861 (Dec. 16, 1941) 22
87 Cong. Rec. 9862 (Dec. 16, 1941) 23
87 Cong. Rec. 9863 (Dec. 16, 1941) 23
87 Cong. Rec. 9865 (Dec. 16, 1941) 23
87 Cong. Rec. 9866 (Dec. 16, 1941) 23
108 Cong. Rec. 22461 (Oct. 5, 1962) 6
122 Cong. Rec. 33532 (Sept. 29, 1976) 8
123 Cong. Rec. 22475-76 (July 12, 1977) 17, 19

MISCELLANEOUS.

Frankfurter, Some Reflections on the Reading of Statutes, 47 Columbia L. Review 527 (1947) 15
Leigh & Atkinson, "Due Process in The Emerging Foreign Relations Laws of the United States, Part I," 21 Bus. Lawyer 853 (July 1966) 5
Leigh & Atkinson, "Due Process In The Emerging Foreign Relations Laws of the United States, Part II," 22 Bus. Lawyer 3 (Nov. 1966) 6
Lowenfeld, "Claims Against Foreign States — A Proposal for Reform of United States Law," 44 N.Y. U.L. Rev. 901 (1969) 6

Note, 15 Harvard International Law Journal 157 (1974) 10

President Carter's Message to Congress, 15 Weekly Comp. of Pres. Docs. 3041 (Jan. 19, 1981) 19

Restatement of the Foreign Relations Law of the United States (Revised) (Tent. Draft No. 1, Apr. 1, 1980) 17

Statement by the President on Signing H.R. 11315 into Law, 12 Weekly Comp. of Pres. Docs. 1554 (Oct. 22, 1976) 9

"Tate Letter," Letter from Jack B. Tate to Philip B. Perlman, May 19, 1952, 26 Dept. State Bull. 984 (1952) 5

Interest of the Amicus Curiae.

Chas. T. Main International, Inc. ("Main") is a consulting engineering firm located in Boston, Massachusetts. In 1978 and 1979, Main performed engineering services for Iran's Ministry of Energy and two Iranian government instrumentalities, Khuzestan Water & Power Authority and Mahab Consulting Engineers. Main performed its work in Boston and Iran, with the assistance of Iranian government employees in both locations. As of November 1, 1979, these entities owed Main a total of $2,878,787. In early November, at Iran's request, Main's senior project engineer went to Tehran to obtain payment. The seizure of the American Embassy compelled his hasty departure.

Unable to obtain payment of this substantial outstanding receivable by negotiation, Main in November 1979 sued Iran and its two instrumentalities in the federal district courts in Massachusetts and New York.[1] In its Massachusetts action, Main obtained a preliminary injunction restraining the Iranian government defendants from transferring their assets located in the United States. Main also obtained attachments on trustee process, which were returned "no funds." In its New York action, Main obtained *ex parte* attachments of assets belonging to the Iranian government defendants at the Federal Reserve Bank of New York and certain New York commercial banks. The United States has stipulated that Main had attached sufficient assets to provide full security for its claims.

On January 20, 1981, President Carter, in the "Algerian Declarations," purported to nullify Main's attachments and preliminary injunction, to suspend jurisdiction of Main's claims in the federal courts, and to remit Main to an international arbitral tribunal which was to have been established by May 19, 1981. The arbitral tribunal is to pay claims out of a one billion dollar security fund — adequate, according to figures supplied by the United States in Main's lawsuit described

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[1] Main also sued the Central Bank of Iran for its failure to cash a $378,000 payment order which Mahab Consulting Engineers had issued to Main shortly before the seizure of the embassy.

below, to pay outstanding claims at twenty cents on the dollar — together with a promise by Iran to pay the remaining balance of the claims. Main, which has never authorized the United States Government to settle its claims against Iran, commenced a declaratory judgment proceeding against the United States and its appropriate officers in February 1981. Main sought a declaration that the executive agreement was in excess of statutory authority and was unconstitutional or, alternatively, that the executive agreement took Main's property for public use without just compensation. On March 17, 1981, the District Court dismissed this complaint. On May 22, 1981, the First Circuit affirmed that order. *Chas. T. Main International, Inc.* v. *Khuzestan Water & Power Authority*, No. 80-1027 (1st Cir. May 22, 1981).

While Main's First Circuit appeal was pending, the United States sought to intervene in the Second Circuit appeal on the determination of "common issues" by Judge Duffy in the Southern District of New York. Main briefed and argued the substantive issues on that appeal, although arguing that remand was the most appropriate course. On April 9, 1981, the Second Circuit issued an order of remand directing Judge Duffy to select a single test case in which to determine the issue of the validity of the Algerian Declarations. *New England Merchants National Bank* v. *Iran Power Generation and Transmission Co., et al.*, Nos. 1049-1144 (2d Cir. April 9, 1981). Following the remand, Main's Southern District action was placed by Judge Duffy on the suspense docket, pending a ruling on the validity of the Algerian Declarations by this Court. Therefore, as a practical matter, the decision by this Court in this case will finally determine Main's actions as well.[2]

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[2] Main has not yet filed a petition for certiorari from the First Circuit's decision. Main had determined to await the decision of Judge Duffy before petitioning. Judge Duffy's opinion holding the Algerian Declarations to be beyond the President's statutory and constitutional powers was issued on June 11, 1981, the same day this Court granted certiorari in this case. Now that the issues are before the Court in this case, Main believes it can most effectively assist the Court by participating on this appeal as amicus curiae.

Moreover, Main provides services to governments and entities located in foreign countries, including a number of developing countries in the Third World. The resolution of the legal issues in this case is of ongoing business interest to Main.

Summary of Argument.

In enacting the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602 *et seq.*, Congress intended to reverse the prior executive practice of terminating lawsuits of private American claimants against foreign states for political or diplomatic reasons. In the Act, Congress provided predictable and certain access to United States courts for United States citizens doing business with foreign states, without executive interference, whether by suggestion of immunity or by executive agreement, as here. Congress deliberately chose to deny to the President whatever purported "flexibility" in international crises may be derived from executive control of such actions. Now to allow the executive branch to suspend the claims of United States citizens against Iran in United States courts eviscerates this congressional intent and permits rejected notions of sovereign immunity to reenter the federal courts through the back door.

The International Emergency Economic Powers Act, 50 U.S.C. §§ 1701, *et seq.* ("IEEPA") does not authorize executive interference with federal court jurisdiction and orders. IEEPA, derived from the Trading with the Enemy Act, was intended to restrict the President's emergency powers in peacetime. Under the wartime statute, the President could not interfere with court proceedings, "nullify" federal court orders, nor confiscate the interests of United States citizens in alien property without just compensation. Respondents' construction of IEEPA to give the President more power in peacetime than he could exercise in war is inconsistent with plainly expressed legislative intent.

Argument.

I. The FSIA was Intended by Congress to Prevent Executive Interference with Court Jurisdiction of Commercial Claims Against Foreign Governments.

The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602 *et seq.* ("FSIA"), enacted in 1976, is broad remedial legislation intended by Congress to eliminate executive branch interference in litigation brought by United States citizens against foreign governments for commercial claims. The purpose of the FSIA is two-fold: "[T]o provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 6 (1976) ("FSIA House Report").[3]

The argument of the United States and the holdings of the First and District of Columbia Circuits rest on the proposition that Congress' secondary purpose in enacting the FSIA — "to provide when a foreign state is entitled to sovereign immunity" — is the sole purpose of the Act, and that the FSIA does not address the issue of "when and how parties can maintain a lawsuit against a foreign state . . . in the courts of the United States. . . ." This interpretation of the statute is at odds with its clearly expressed legislative purpose.

A. *The FSIA Was Intended by Congress to Reverse Prior Executive Practice.*

Prior to the enactment of the FSIA, actions by United States citizens against foreign states were cognizable in United States

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[3]The FSIA House Report is identical to the Senate report, S. Rep. No. 94-1310, 94th Cong., 2d Sess. (1976), except for pagination. All citations herein will be made to the FSIA House Report.

courts. However, such actions would be terminated upon the State Department's filing a suggestion of immunity, to which the court would normally "defer." *See, e.g., Rich* v. *Naviera Vacuba, S.A.*, 197 F.Supp. 710 (E.D. Va.), *aff'd.*, 295 F.2d 24 (4th Cir. 1961).

Under pre-FSIA practice, a foreign state that did not wish to be sued in the United States would request the State Department to file a suggestion of immunity. The State Department would decide such requests on the basis of political considerations, often without regard to any rule of law. *See generally*, Leigh & Atkinson, *Due Process In The Emerging Foreign Relations Law Of The United States, Part I*, 21 Bus. Lawyer 853 (July 1966). After the lawsuit was terminated, the citizen's claim would, at the State Department's discretion, be "adjusted through diplomatic channels." *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 34 (1945); *Ex Parte Republic of Peru*, 318 U.S. 578, 588-89 (1943) (under this immunity practice, "the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsion of judicial proceeding").[4] Even after expounding the "restrictive theory" of sovereign immunity in the Tate Letter, Letter from Jack B. Tate to Philip B. Perlman, May 19, 1952, 26 Dept. of State Bull. 984 (1952), the State Department frequently departed

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[4] Before the enactment of the FSIA, the defense of sovereign immunity was unavailable to unfriendly sovereign states. *E.g., White* v. *Mechanics Securities Corp.*, 269 U.S. 283 (1925); *Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812); *cf., New England Merchants National Bank* v. *Iran Power Generation and Transmission Co., et al.*, 502 F.Supp. 120, 124 (S.D.N.Y. 1980), *remanded*, Nos. 1049-1144 (2d Cir. April 9, 1981). Under respondents' interpretation of the FSIA, unfriendly states that are willing to defy international standards of conduct will be able to escape suit in United States courts, while friendly states unwilling to provoke an international emergency can be sued here for commercial acts. This is a result which Congress in enacting the FSIA plainly did not intend.

from its articulated policy by filing suggestions of immunity when it was politically expedient to do so.[5]

A version of the FSIA was first proposed in 1973 in response to academic, business and congressional pressure for a certain, non-discretionary United States remedy for citizens doing business with foreign states.[6] In enacting the FSIA in 1976, Congress recognized that the absolute theory of sovereign immunity, with diplomatic claims settlement practices and subordination of individual rights to foreign policy goals, was incompatible with modern international trade. *See, e.g.*, FSIA House Report, *supra*, at 6-7.[7] Congress consciously

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[5] The restrictive theory provides that a foreign state is not entitled to claim sovereign immunity for its "commercial acts" — acts which a private person could perform. *See, Victory Transport, Inc.* v. *Comisaria General*, 336 F.2d 354, 358 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). This concept is also embodied in a series of friendship, commerce and navigation treaties. Thus, the Treaty of Amity between the United States and Iran, 8 U.S.T. 899, Art. XI(4), provides that if Iran or its entities engaged in certain business activities in the United States, they would be subject to suit and other liabilities here as if they were private persons.

[6] In reaction to an agreement with Cuba in which a suggestion of immunity was filed in exchange for Cuba's release of a hijacked United States airliner, *Rich* v. *Naviera Vacuba, S.A.*, *supra*, Senator Ervin proposed a bill to provide explicit federal court jurisdiction of such cases. He urged: "[L]et us . . . give [American] citizens a maximum chance to protect themselves in their own country through our own laws and our own lawyers." 108 Cong. Rec. 22461 (Oct. 5, 1962). The campaign was taken up by Monroe Leigh and Timothy Atkinson, Leigh & Atkinson, *Due Process In The Emerging Foreign Relations Law of the United States. Part II*, 22 Bus. Lawyer 3, 17-19, 27 (Nov. 1966); *see also*, Lowenfeld, *Claims Against Foreign States — A Proposal for Reform of United States Law*, 44 N.Y.U.L.Rev. 901 (1969).

[7] These principles were vigorously expressed in the pre-FSIA case of *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 703-04 (1976) ("Participation by foreign sovereigns in the international commercial market has increased substantially in recent years. . . . The potential injury to private businessmen — and ultimately to international trade itself — from a system in which some of the participants in the international market are not subject to the rule of law has therefore increased correspondingly").

determined to eliminate the diplomatic advantages of using private claims as a "bargaining chip" in political crises, in order to further the other important national objective of fostering international trade. (*See*, *infra*, at 9-11). Congress thus provided jurisdiction of actions against foreign states and eliminated executive branch interference with such litigation, whether by suggestion of immunity or by executive agreement and orders of broad applicability, as here.

B. *The FSIA Confers Jurisdiction of Commercial Claims Against Iran.*

The FSIA provides United States court jurisdiction of civil actions against foreign states[8] that are not entitled to claim sovereign immunity. 28 U.S.C. § 1330. Congress provided in the Act that immunity determinations were to be made exclusively by the courts, using the legal standards set out in the statute and under circumstances that guarantee due process. 28 U.S.C. § 1602.

Under the FSIA, a federal or state court has jurisdiction of a commercial claim against a foreign state where the claim has specified minimum jurisdictional contacts with the United States. 28 U.S.C. §§ 1330, 1605(a)(2). A foreign state subject to United States jurisdiction "shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. Pre-judgment attachment of property of a foreign state is available under the FSIA if the state has explicitly waived immunity from pre-judgment attachment. 28 U.S.C. § 1610(d).[9]

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[8] The term "foreign state" is defined in 28 U.S.C. §§ 1603(a)-(b) to include the state, its entities and state-controlled corporations.

[9] Iran also waived immunity from suit and pre-judgment attachment in the Treaty of Amity, Art. XI, ¶4. *See, e.g., Marschalk Company, Inc.* v.

C. *The Legislative History of the FSIA Demonstrates Conclusively that Congress Did Not Intend Any "International Emergency" Exception to the FSIA.*

The legislative history of the FSIA provides a clear record of Congress' decision to eliminate all executive branch interference with commercial litigation by United States citizens against foreign states, by suggestion of immunity or by executive agreement. The FSIA was intended to "inform parties when they can have recourse to the courts to assert a legal claim against a foreign state." FSIA House Report, *supra*, at 7. This purpose, repeatedly emphasized in the Committee Reports on the FSIA, *see*, *id.* at 6, 8, 9, 12,[10] was articulated by President Ford on signing the FSIA into law:

Iran National Airlines Corporation, et al., 79 Civ. 7035 (CBM) (S.D.N.Y. June 11, 1981); *Electronic Data Systems Corp. Iran* v. *Social Security Organization of Iran*, 79 Civ. 1711 (S.D.N.Y. May 23, 1979), *remanded on other grounds*, 610 F.2d 94 (2d Cir. 1979); *Reading & Bates Drilling Co.* v. *National Iranian Oil Co.*, 79 Civ. 6034 (S.D.N.Y. Nov. 29, 1979); *Behring International, Inc.* v. *Imperial Iranian Air Force*, 475 F.Supp. 383, 390 (D.N.J. 1979).

[10] *See also*, 122 Cong. Rec. 33532 (Sept. 29, 1976) (Rep. Danielson); Hearings on H.R. 11315 before House Comm. on Judiciary, Subcomm. on Admin. Law and Govt. Rels., 94th Cong. 2d Sess. (June 2 and 4, 1976) ("FSIA House Hearings"), at 24-25, 27, 29 (Monroe Leigh, Legal Adviser State Dept.); 30, 31 (Bruno Ristau, Justice Dept.) (executive branch intercession "has caused foreign relations problems for the executive branch," and the bill would "depoliticize the area"); Joint Letter from Depts. of State and Justice to Speaker of the House, *reprinted in* FSIA House Report, *supra*, at 44-45 (endorsing effort to "facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation" by committing these issues exclusively to the judiciary). As Monroe Leigh stated: "[W]hen the foreign state enters the marketplace or when it acts as a private party, there is no justification in modern international law for allowing the foreign state to avoid the economic costs of the agreement which it may breach. . . . The law should not permit the foreign state to shift these everyday burdens of the marketplace onto the shoulders of private parties." FSIA House Hearings, *supra*, at 27.

> "This legislation will enable American citizens and foreign governments alike to ascertain when a foreign state can be sued in our courts. In this modern world where private citizens increasingly come into contact with foreign government activities, it is important to know when the courts are available to redress legal grievances." Statement by the President on Signing H.R. 11315 Into Law, 12 Weekly Comp. of Pres. Docs. 1554 (October 22, 1976).

See, Texas Trading & Milling Corp. v. *Federal Republic of Nigeria*, No. 644 (2d Cir. April 16, 1981), Slip Op. at 2588, 2597, 2602, 2608-09 (Congress enacted the FSIA "specifically" to provide "access to the courts to those aggrieved by the commercial acts of a foreign sovereign," reasoning that the underlying goal of the FSIA was to ensure that all participants in the marketplace are treated equally). As the Second Circuit stated, "'If a government department goes into the market places of the world and buys boots or cement — as a commercial transaction — that government department should be subject to all the rules of the marketplace,'" *id.* at 2597 (citation omitted); *see*, *id.* at 2609 ("Our rulings today . . . affirm the right of all participants in the marketplace of the world to be treated as equals. . . ."); *see*, *Marschalk Company*, *supra*, Slip Op. at 28 (FSIA eliminates "all executive branch interference with the jurisdiction of the United States courts of commercial claims of United States citizens against foreign defendants").

The FSIA restricts executive branch flexibility in an international crisis. This was the result of a deliberate congressional choice. Congress considered and rejected the notion of executive control of commercial claims, although permitting continuing executive control of expropriation claims under

22 U.S.C. § 2370(e)(2). FSIA House Report, *supra*, at 20 & n.1, citing *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, *supra*.

At the House Hearings, Monroe Leigh, Legal Adviser to the State Department, asked Congress to weigh the "advantage to the State Department to be able to intervene by expressing essentially a political judgment in an act of state [sic] case pending in the courts" against the "substantial disadvantages" of this practice. FSIA House Hearings, *supra*, at 34. Mr. Leigh emphasized the "substantial disadvantages" of the existing "system in which some government is putting strong pressure on the Department of State to decide a lawsuit — we would much rather see it handled by the courts." *Id.* He added:

> "[T]he State Department, being a political institution, has not always been able to resist these pressures. And to my way of thinking, this consideration of political factors is, in fact, the very antithesis of the rule of law which we would like to see established." *Id.* at 35.

Michael Cardozo, a proponent of executive branch power to interfere with court proceedings, argued in the House Hearings that such power was needed to give the President "flexibility" in international affairs. He cited as an example of this need the State Department's deal with Cuba in which the State Department traded a suggestion of immunity for a hijacked United States airliner. *Id.* at 61-65; *see*, *Rich* v. *Naviera Vacuba, S.A.*, *supra*.[11]

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[11] As one writer noted in discussing the 1973 predecessor bill to the FSIA and *Rich* v. *Naviera Vacuba, S.A.*, *supra*, "[I]f immunity is used as a political bargaining chip, it may be granted most often to sovereigns in relation to whom the interests of the United States are in jeopardy, with the result that enemies gain more from its use than allies." Note, 15 Harv. Int. Law J. 157, 170 (1974).

Congress, with both arguments before it, rejected Mr. Cardozo's view. It struck the balance by giving up the occasional foreign policy advantage of being able to barter with a foreign government in hijackings, hostage takings and other rare events in exchange for the advantages of promoting international trade, providing predictability for litigants and eliminating political pressure on the State Department. The FSIA thus provides for court jurisdiction that cannot be traded away by the executive.

Congress eliminated executive interference through suggestions of immunity and executive agreements. The bill as originally proposed by the State and Justice Departments provided that the FSIA would be "[s]ubject to existing *and future international agreements*." H.R. 11315, § 1604 (emphasis added). The reference to "future international agreements" was deleted in committee, because "it was thought best to eliminate any possible question that this language might be construed to authorize a future international agreement" that might interfere with court jurisdiction. FSIA House Report, *supra*, at 10; *Marschalk Company*, *supra*, Slip Op. at 29. Discussions in the FSIA House Hearings further confirm the intent to prohibit executive interference with court jurisdiction:

> "[Rep.] MOORHEAD. . . . But those clauses also refer to future agreements which would totally potentially change the operation of these suits [against foreign states]. And isn't Congress giving an awful lot of discretion to the State Department in referring to any future agreement as being authorized to change the basic substance of the law?
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> "Mr. LEIGH: Well, I think on that, Mr. Moorhead, that anything of significance which the Executive tried to do in this area, it would have to do by coming back to Congress, either by treaty or by some form of legislation which would give Congress an opportunity to decide.

"Mr. MOORHEAD: A treaty doesn't go back to the House of Representatives, though.

"Mr. LEIGH: I make that statement, however, in the knowledge of the kinds of things that would have to be done here. I don't believe a treaty would be self-executing, but would require some form of implementing legislation which would involve the House of Representatives." FSIA House Hearings, *supra*, at 52.[12]

Later, Representative Moorhead stated in a colloquy with Mr. Olmstead, a private attorney:

"Mr. MOORHEAD: There is some wording in some of this legislation that I have been a little bit concerned about. . . . The bill states that the immunity of foreign states recognized by this bill is subject to existing and future international agreements.

"Is not this not [sic] a delegation of tremendous authority by the Congress to the executive or whoever might be entering into these international agreements?"

Mr. Olmstead responded that "it would take an act of Congress to implement [any change in the FSIA] because it does involve the judiciary [over] which the Congress has sole constitutional authority." *Id.* at 86-87.

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[12] Under well-established law, an executive agreement (or treaty) will not be self-executing if the agreement impinges on an area within the exclusive control of both houses of Congress. *See, e.g., Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888); *Edye* v. *Robertson* (Head Money Cases), 112 U.S. 580, 598-99 (1884). The Algerian Declarations require for their implementation legislation within two areas of Congress' exclusive control. First, the Declarations purport to nullify claims pending in federal courts and to deny

In reporting the FSIA, the committees chose to delete the reference to "future international agreements" rather than leave open any possible "discretion to the State Department . . . to change the basic substance of the law." *Id.* at 52. Congress thereby eliminated any residual executive power to vary the terms of the FSIA by international executive agreement, such as the executive has attempted to do here.

The First Circuit's reasoning that the President has not here interfered with federal court jurisdiction, but has merely "settled" Main's underlying claim, eviscerates Congress' principal intent in enacting the FSIA to "provide when and how parties can maintain a lawsuit against a foreign state . . . in the courts of the United States. . . ." FSIA House Report, *supra*, at 6. As the Solicitor General argued as amicus curiae in *Dunhill*:

> "[U]nder the modern restrictive theory of sovereign immunity, a foreign state is not immune from suit on its commercial obligations. To elevate a foreign state's commercial acts to the protected status of 'acts of state' would frustrate this modern development by permitting sovereign immunity to reenter through the back door, under the guise of the act of state doctrine." Amicus Brief of United States at 41, cited in FSIA House Report, *supra*, at 20, n.1.

The "niceties of language" should not obscure the real effect of the Algerian Declarations. *Marschalk Company*, *supra*,

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federal court jurisdiction over such claims, an area within Congress' exclusive power. Second, Art. VI of the Declarations provides that the expenses of the Tribunal are to be borne equally by the United States and Iran. However, only Congress can exercise the appropriations power; an executive agreement is not self-executing if it requires the appropriation of federal funds. *E.g.*, *Edwards* v. *Carter*, 580 F.2d 1055, 1058 (D.C. Cir.) (per curiam), *cert. denied*, 436 U.S. 907 (1978) (treaty); *Turner* v. *American Baptist Missionary Union*, 24 Fed. Cas. 344 (No. 14, 251) (C.C. Mich. 1852).

Slip Op. at 32. This purported "claims settlement" does not "settle" Main's claims, nor does it provide relief previously unavailable because of sovereign immunity. *Id.* at 45-46. Rather, in the face of a congressional statute to the contrary, it allows Iran to avoid the jurisdiction of United States courts under the FSIA.[13] It permits sovereign immunity to reenter through the back door under the guise of claims settlement doctrine. In the Solicitor General's own view, this cannot be permitted.

II. IEEPA Does Not Permit Executive Interference with United States Litigation or Court Process.

The International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 *et seq.* ("IEEPA"), does not authorize executive branch interference in domestic litigation, even in an national emergency. The First and District of Columbia Circuits, in holding to the contrary, have woodenly applied the language of 50 U.S.C. § 1702(a)(1)(B), without regard to the congressional purpose and history of that provision.[14]

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[13] The single reference to claims settlement practice in the legislative history of the FSIA suggests that Congress viewed the claims settlement power as an "option" which could be used by a claimant against a foreign government where, for example, the claimant had obtained an FSIA-authorized judgment but was unable to obtain execution of judgment in the United States. Hearings before the Subcomm. on Claims and Govt. Rels., Comm. on Jud., on H.R. 3493, 93d Cong. 1st Sess. 23-26 (1973). However, the FSIA House Report advises caution in utilizing the 1973 legislative history to construe the 1976 Act, FSIA House Report, *supra*, at 12, and the foreign sovereign immunities bills proposed in 1973, S. 566 and H.R. 3493, 93d Cong. 1st Sess., differed in significant respects from the FSIA as enacted.

[14] This Court has long spoken out against the literal application of statutory language. *United Housing Foundation Inc.* v. *Forman*, 421 U.S. 837, 849 (1975); *Church of the Holy Trinity* v. *United States*, 143 U.S. 457,

A. *IEEPA's Language Provides No Authority for Executive Branch Interference with Court Jurisdiction or Remedies.*

A literal reading of 50 U.S.C. § 1702(a)(1)(B), granting the President power in an international emergency to "investigate, regulate, direct and compel, nullify, void, prevent or prohibit" the acquisition or exercise of "any right, power or privilege" by any person within the jurisdiction of the United States with respect to any property in which a foreign country or national has an interest, would permit the President virtually unlimited powers in a national emergency. IEEPA was part of the 1977 "Trading with the Enemy Act Reform Legislation" and was intended by Congress to limit the scope of presidential power in peacetime. Under the Trading with the Enemy Act, 50 U.S.C. App. §§ 1 *et seq.* ("TWEA"), in times of war, the President was not permitted to "intermeddle" with private litigation in the absence of express congressional authorization to do so. *White* v. *Mechanics Securities Corp.*, 269 U.S. at 301. The President here seeks more power in peacetime than he was able to exercise under TWEA in time of war. Such a construction of IEEPA is inconsistent with the legislative intent.

IEEPA, § 1702(a)(1)(B) does not justify executive branch interference with United States litigation. It grants the Presi-

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459 (1892) ("[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers"); *Civil Aeronautics Board* v. *Delta Airlines, Inc.*, 367 U.S. 316, 328 (1961) ("[Literalism] 'has all the tenacity of original sin and must constantly be guarded against'"). *See*, Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947). With respect to the predecessor statute to IEEPA, the Trading with the Enemy Act, Justice Frankfurter cautioned that the statute was a "makeshift patchwork" enacted to deal with complex and far-reaching wartime problems; hence, "such legislation strongly counsels against literalness of application. It favors a wise latitude of construction in enforcing its purposes." *Guessefeldt* v. *McGrath*, 342 U.S. 308, 319 (1952).

dent only economic powers with respect to the property of foreign countries or their nationals, in international emergencies. *See*, H.R. Rep. No. 95-459, 95th Cong. 1st Sess. 10-11 (1977) ("IEEPA House Report"). It does not provide an exception to the FSIA's *in personam* jurisdiction and remedies against foreign states.

IEEPA cannot be read implicitly to alter federal court jurisdiction and remedies: a statute restricting the jurisdiction of or remedies available in a federal court must be clear and unequivocal. *See*, *Johnson* v. *Robison*, 415 U.S. 361, 373-74 (1974); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967); *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946); *Hecht Co.* v. *Bowles*, 321 U.S. 321, 330 (1944); *Rich* v. *Naviera Vacuba, S.A.*, 197 F.Supp. at 717-18 (national emergency legislation, 50 U.S.C. § 191, did not empower the Coast Guard to interfere with federal court process in the absence of a "statute expressly authorizing" such interference). IEEPA has repeatedly been construed to provide no exception to FSIA jurisdiction or remedies. *Chas. T. Main International, Inc.* v. *Khuzestan Water & Power Authority*, No. 80-1027 Slip Op. at 13-14a & n.13 (1st Cir. May 22, 1981) (jurisdiction); *American International Group, Inc.* v. *Islamic Republic of Iran*, No. 80-1779 Slip Op. at 27 n.15 (D.C. Cir. decided May 22, 1981, opinion issued June 5, 1981) (jurisdiction); *Marschalk Company*, *supra*, Slip Op. at 30; *Electronic Data Systems Corp. Iran* v. *Social Security Organization of the Government of Iran*, 508 F.Supp. 1350, 1364 (N.D. Tex. 1981), *cert. denied*, 49 U.S.L.W. 3912 (June 8, 1981); *National Airmotive Corp.* v. *Iran*, 499 F.Supp. 401, 404-05 (D.D.C. 1980); *cf.*, *White* v. *Mechanics Securities Corp.*, 269 U.S. at 301 (construing TWEA).[15]

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[15] Repeals by implication are not favored, and an intent to repeal by implication must be "clear and manifest." *E.g.*, *Silver* v. *New York Stock*

B. *The Legislative History of IEEPA Indicates Clearly that Congress Intended No Executive Interference with Court Jurisdiction or Remedies.*

TWEA authorized the President to take certain extraordinary measures to deal with international crises in times of peace and war. In enacting IEEPA in 1977, Congress limited TWEA's broad grant of authority to times of declared war. IEEPA House Report, *supra*, at 2, 7, 10. Criticizing TWEA as having "become essentially an unlimited grant of authority for the President to exercise, at his discretion, broad powers in both the domestic and international economic arena," Congress in IEEPA created a "new set of international economic powers, more restricted than those available during time of war. . .." *Id.* at 10. *See also*, Revision of Trading With the Enemy Act, Markup Before the Committee on International Relations, 95th Cong. 1st Sess. 5 (1977) ("House Markup") (under TWEA, the President exercised almost "dictatorial" powers in peacetime; IEEPA restricted this power substantially).

In IEEPA, Congress limited the President's authority to transactions which are "international" and "economic" in nature. *See*, 123 Cong. Rec. 22475 (July 12, 1977) (Rep. Bingham). The IEEPA House Report states: "As a further substantive constraint, the scope of the authorities should be clearly limited to the regulation of international economic transactions." *Id.* at 10-11. *See*, S. Rep. No. 95-466, 95th

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Exchange, 373 U.S. 341, 357 (1963); *Posadas* v. *National City Bank of New York*, 269 U.S. 497, 503 (1936). *See also*, Restatement of the Foreign Relations Law of the United States (Revised) 66, § 135 comment a (Tent. Draft No. 1, Apr. 1, 1980) ("authorization to make agreements superseding federal law should not be inferred lightly . . .").

Cong. 1st Sess. 2 (1977) ("IEEPA Senate Report").[16] IEEPA was not intended to permit executive control of "noneconomic aspects of international intercourse." IEEPA House Report, *supra*, at 11. An executive order nullifying attachments and suspending jurisdiction is not regulation of international economic transactions; it is direct interference with the judicial process. *Marschalk Company*, *supra*, Slip Op. at 29.

IEEPA's legislative history contains no intimation that the statute was intended to affect FSIA jurisdiction and pre-judgment security rights. Rather, IEEPA was intended to augment judicial remedies by providing, by means of IEEPA's freezing power, additional security for claimants. *See*, 50 U.S.C. § 1706(a); *Marschalk Company*, *supra*, Slip Op. at 25; IEEPA House Report, *supra*, at 17; IEEPA Senate Report, *supra*, at 6. Congress intended that private litigation against frozen assets, including the claimants' ability to "impound properties or accounts," would continue unimpeded. IEEPA House Hearings, *supra*, at 217-18 (interchange between Rep. Findley and Mr. Majak, staff counsel).

Congress did not provide in IEEPA any counterpart to TWEA's wartime power to seize and vest enemy assets — the very powers the Government seeks to exercise here. Thus, § 5(b) of TWEA, 50 U.S.C. App. § 5(b) delegates to the President the power to vest and the power to "hold, use [or]

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[16] As examples of "international economic transactions," Congress referred to "foreign exchange transactions, transfers of credit or payments between banking institutions," "importing or exporting of currency or securities," and "regulat[ing] or freez[ing] any property in which any foreign country or a national thereof has any interest." IEEPA Senate Report, *supra*, at 5; *see*, IEEPA House Report, *supra*, at 15; 123 Cong. Rec. 22476 (July 12, 1977); House Markup, *supra*, at 8 (Rep. Bingham); Hearings before House Subcommittee on International Economic Policy of the Committee on International Relations, House of Representatives, on H.R. 1560 and H.R. 2382, 95th Cong. 1st Sess. 163 (1977) ("IEEPA House Hearings") (interchange between Rep. Bingham and Mr. Majak, staff counsel).

otherwise deal with [alien property] in the interest of and for the benefit of the United States." TWEA was amended in 1977 "to remove the authority of the President to use [those] authorities [in international crises] other than a declared war." IEEPA House Report, *supra*, at 2. *See also*, 123 Cong. Rec. 22475 (July 12, 1977) (Rep. Bingham); House Markup, *supra*, at 4 (Rep. Bingham).[17] The wartime presidential powers thus withheld in IEEPA included the power "'to affirmatively compel the use and application of foreign property in a manner consistent with the interests of the United States.' Sen. Rep. No. 911, 77th Cong 1st Sess p. 2." *Clark* v. *Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 487 (1947) (citing legislative history of TWEA) (footnote omitted).

The orders and regulations at issue here do more than "freeze," "regulate" or "block" Iranian interests in property. They suspend court jurisdiction, nullify court orders and affirmatively direct the transfer of blocked Iranian assets out of the United States, for the benefit of the United States. *See*, President Carter's Message to Congress, 17 Weekly Comp. of Pres. Docs. 3041, 3042 (January 19, 1981). This effects a seizure of Main's interests in that property and a deprivation of Main's rights beyond that permitted even in wartime. As such, it is prohibited by IEEPA.

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[17] *See*, IEEPA Senate Report, *supra*, at 5 ("Section 203(a) would grant the President emergency authority to regulate foreign exchange transactions, transfers of credit or payments between banking institutions where a foreign interest is involved, import or export of currencies or securities, and to control or freeze property transactions where a foreign interest is involved. . . . Authority to vest property . . . and regulate purely domestic economic transactions would not be granted"); 123 Cong. Rec. 22475, 22476 (July 12, 1977) (Rep. Bingham); House Markup, *supra*, at 3 (Rep. Bingham) (no power to "seize property"), 4 (Rep. Bingham) ("freeze but not seize"), 18 (Rep. Solarz), 20 (Mr. Bergsten), 38 (Rep. Bingham) ("the power to freeze assets" given in IEEPA; the "power to seize property" is limited to exercise in wartime).

TWEA § 5(b) did not bar a United States citizen, even without a Treasury Department license, from bringing a lawsuit against an enemy alien to recover a debt or from obtaining an attachment that created rights effective against the alien debtor. *Zittman* v. *McGrath*, 341 U.S. 446 (1951); *Propper* v. *Clark*, 337 U.S. 472 (1949); *Lyon* v. *Singer*, 339 U.S. 841 (1950); *Farbenfabriken Bayer A.G.* v. *Sterling Drug, Inc.*, 251 F.2d 300, 303-05 (3d Cir.), *cert. denied*, 356 U.S. 957 (1958); *Kuerschner & Rauchwarenfabrik A.G.* v. *New York Trust Co.*, 126 F.Supp. 684, 688 (S.D.N.Y. 1954) (under blocking regulations); *contra*, *Chase Manhattan Bank* v. *United China Syndicate, Ltd.*, 180 F.Supp. 848 (S.D.N.Y. 1960). Indeed, in *Orvis* v. *Brownell*, 345 U.S. 183, 186-87 (1953), on which the First Circuit relied, this Court found that an unlicensed lawsuit "determined relationships between creditor and enemy debtor" and in *Zittman* stated that the Custodian could not "annul" judicial attachments.[18]

C. *IEEPA Does Not Give the President Greater Power in Peacetime than TWEA Gives Him in Time of War.*

The Government, in relying on IEEPA, § 1702(a)(1)(B), argues that IEEPA authorizes the President to nullify non-

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[18] This Court in *Orvis* held than an unlicensed state court attachment did not "permit the transfer of a property interest in the blocked funds *which could be asserted against the Custodian*" to prevent vesting of seized assets. 345 U.S. at 187 (emphasis added). As this Court had earlier explained in *Silesian-American Corp.* v. *Clark*, 332 U.S. 469, 479 (1947), "When § 5(b)(1) was enacted [in 1941] . . ., it authorized the taking of any property or interest therein of any foreign national. This broadening of the scope of the Custodian's power to vest so as to include interests of friendly aliens in property includes the power to vest the interest which friendly aliens have from pledges." This Court held, however, that pledgees (friendly alien shareholders of the plaintiff) were entitled to compensation for the Custodian's taking of their interests. *Id.* at 480. *See also*, *Guessefeldt* v. *McGrath*, 342 U.S. at 318.

Iranian interests in property, without compensation, and to order the transfer of that property to Iran. The Government argues that the President exercised these powers under the identical language of TWEA and that in IEEPA, Congress gave the President all of his TWEA powers except, as pertinent here, power to "vest" alien property. The Government's argument rests on the implausible proposition that Congress gave the President greater substantive powers, with fewer protections for individual rights, in peacetime than Congress was willing to give the President in TWEA for use in times of war. This argument ignores the legislative history of IEEPA and sixty-four years of judicial construction of TWEA.

As enacted in 1917, 40 Stat. 415, TWEA prohibited all unlicensed wartime trading with the enemy and permitted the President to "investigate, regulate or prohibit" certain international monetary transactions. As amended in 1918, 40 Stat. 1020, TWEA further empowered the President, through an Alien Property Custodian ("Custodian"), to seize enemy property. TWEA § 7(c), 50 U.S.C. App. § 7(c).

The provisions for seizure of enemy property were designed to remove any possibility of benefit to the enemy. However, Congress intended to protect the rights of "innocent claimants, notwithstanding the enforced absence of enemy parties in interest." *See, e.g.*, H.R. Rep. No. 85, 65th Cong. 1st Sess. 4 (1917). Congress provided a federal court remedy for United States citizens to recover their property or debts owed to them by an enemy whose property had been seized. TWEA § 9, 40 Stat. 419-20. As this Court reasoned in *Miller* v. *Robertson*, 266 U.S. 243, 248 (1924), the seizure of enemy property

> "might embarrass or ruin those having business transactions with them. By the taking, the property seized would be put out of reach of persons claiming it, and beyond the power of creditors to attach it for debt. The

> purpose of § 9 was to prevent or lessen losses and inconvenience liable to result to non-enemy persons. This provision is highly remedial and should be liberally construed to effect the purposes of Congress. . . . The just purpose of the section is not to be defeated by a narrow interpretation or by unnecessarily restricting the meaning of the word within technical limitations." *Id.* (citations omitted).

This Court repeatedly stated that TWEA, as it affected non-enemy interests, would be unconstitutional if it did not adequately "secure to the non-enemy owner either the return of his property or compensation for it." *Becker Steel Co. of America* v. *Cummings*, 296 U.S. 74, 79 (1935) (Stone, J.); *see*, *Silesian-American Corp.* v. *Clark*, 332 U.S. at 479-80 (right to compensation implied for seizure of interest of friendly pledgees); *Central Union Trust Co.* v. *Garvan*, 254 U.S. 554, 566 (1921) (Holmes, J.); *Stoehr* v. *Wallace*, 255 U.S. 239, 246 (1921). Moreover, federal courts construed the 1917 version of TWEA to permit suits against the enemy and to allow attachment of enemy property that had not been seized. *Watts, Watts & Co.* v. *Unione Austriaca de Navigazione*, 248 U.S. 9, 22 (1918) (Brandeis, J.).[19] Attachment of enemy property was prohibited after seizure, but the Custodian was required to hold the property pending resolution of the claimant's suit. *See*, TWEA § 9, 40 Stat. 419-20; *see generally*, *Becker Steel Co. of America* v. *Cummings*, 296 U.S. at 79.

In 1941, Congress amended TWEA § 5(b), 55 Stat. 839-40, to provide more effective blocking power. 87 Cong. Rec. 9861

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[19] This is consistent with prior wartime practice. *See*, *Shields* v. *Schiff*, 124 U.S. 351 (1888); *Avegno* v. *Schmidt*, 113 U.S. 293 (1885); *Citizens' Bank of Louisiana* v. *United States*, 87 U.S. (20 Wall.) 114 (1874).

(Dec. 16, 1941) (Rep. Hancock), 9862 (Rep. Gwynne), 9865 (Reps. Kefauver, Williams). This is the language now in IEEPA, § 1702(a)(1)(B), relied on by the Government. The 1941 amendment also added to § 5(b) a new power, to augment § 7(c)'s power to "seize" alien interests in property — the power to vest possession or ownership of such interests in the United States, and to "liquidate," "hold and use" or "dispose" of such property in the national interest. 87 Cong. Rec. 9838 (Dec. 16, 1941) (Sen. Van Nuys), 9862 (Rep. Gwynne), 9865 (Rep. Kefauver); S. Rep. No. 911, 77th Cong. 1st Sess. 2 (1941). Under the 1941 amendment, as before, § 9(a) gave a United States creditor a right to bring an action to recover his interest or debt from alien property seized or vested under the Act. *See, Guessefeldt* v. *McGrath*, *supra*.

TWEA § 5(b), as well as IEEPA, § 1702(a)(1)(B), was not intended by Congress to apply freezing or blocking controls to the interests of United States citizens. *E.g.*, IEEPA House Hearings, *supra*, at 173 (Mr. Santos, Treasury Dept.). The legislative history of the 1941 amendment of TWEA, adding § 5(b), clearly demonstrates that the section as amended was intended to apply only to permit blocking or vesting of alien interests in property, not the interests or property of United States citizens. *See, e.g.*, 87 Cong. Rec. 9863 (Dec. 16, 1941) (Reps. Kefauver, Gwynne), 9865, 9866 (Reps. Williams, O'Hara). This Court has repeatedly given effect to this legislative intent of TWEA by declining to confiscate the interests of United States citizens or alien friends. *See, Kaufman* v. *Societe Internationale Pour Participations Industrielles et Commerciales, S.A.*, 343 U.S. 156, 160 (1952) ("The innocent stockholder may not have title to corporate assets, but he does have an interest which Congress has indicated should not be confiscated merely because some others who have like interests are enemies"); *Clark* v. *Uebersee Finanz-Korp, A.G.*, 332 U.S. at 487-88; *Becker Steel Co. of America* v. *Cummings*, 296

U.S. at 79 ("But in thus authorizing the seizure of property as a war measure Congress did not attempt the confiscation of the property of citizens or alien friends").

The First and District of Columbia Circuits found that the literal language of IEEPA, § 1702(a)(1)(B), taken verbatim from the first paragraph of TWEA § 5(b), permits the President to "direct and compel" the transfer or delivery of Iranian property out of the United States. In so finding, these courts ignore the other substantive sections of TWEA that are not replicated in IEEPA.[20] TWEA § 7(c) explicitly gives the President the power to order that enemy property "be conveyed, transferred, assigned, delivered or paid over" to the Custodian. This language would be surplusage if the "common language" of TWEA § 5(b) also permitted the President to "direct and compel" the transfer or delivery of funds to a federal official. To give meaning to this specific language of TWEA § 7(c), the "common language" of TWEA § 5(b) must be construed to provide only for the "freezing" or "blocking" of foreign interests in property. Congress' insistence in IEEPA that the President is only authorized to "freeze but not seize" alien property (*see*, *supra*, at 18-19) is thus substantiated by Congress' deletion in IEEPA of the seizure power of TWEA § 7(c), as well as the vesting power of TWEA § 5(b).

The fact that IEEPA has no counterpart to TWEA § 9 confirms that the power to seize was excluded from IEEPA. In TWEA §§ 5(b) and 7(c), Congress specifically provided for executive seizure, vesting and use of alien property, qualified by limitations and safeguards or remedies. IEEPA, by contrast, has no such limitations, safeguards or remedies. As Justice Frankfurter reasoned in reviewing the executive claim of an implied power to seize in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1942):

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[20] For the Court's convenience, Main has provided a chart showing the differences between these statutes in a statutory appendix to this brief.

> "This body of enactments [statutes specifically providing for seizure by the executive] . . . demonstrates that Congress deemed seizure so drastic a power as to require that it be carefully circumscribed whenever the President was vested with this extraordinary authority." 343 U.S. at 598.

The absence in IEEPA of any safeguards or limitations on the asserted authorization to seize (or "nullify") provides conclusive evidence that "[a]uthorization for seizure as an available remedy for potential dangers was unequivocally put aside." *Id.* at 599-600, 602.

The First Circuit reads IEEPA broadly (and the FSIA narrowly) and defers to executive interpretation so as to provide maximum executive authority here. The rationale offered is that foreign affairs are involved. This rationale is inappropriate where the statutes involved are remedial statutes, explicitly intended by Congress to restrict executive power, to protect the interests of United States citizens by preserving a claims fund in the United States, and (in the FSIA) to provide United States court jurisdiction of such claims, free from diplomatic considerations. Such legislation — even in the foreign affairs area — must be construed to effect Congress' remedial purpose. *Miller* v. *Robertson*, 266 U.S. at 248.

Conclusion.

For the foregoing reasons, Chas. T. Main International, Inc. respectfully urges this Court to reverse the judgment below.

Respectfully submitted,

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APPENDIX A — Comparison of Pertinent Sections of TWEA and IEEPA.

II. SECTION 5(b) OF THE TRADING WITH THE ENEMY ACT, 50 U.S.C. APP. § 5(b), AS AMENDED IN THE FIRST WAR POWERS ACT OF 1941, C. 593, 55 STAT. 839-40 (DEC. 18, 1941), PROVIDES IN PERTINENT PART:

(1) During the time of war [or during any other period of national emergency declared by the President], the President may, through any agency that he may designate, [or otherwise,] and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers or credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes;

. . . .

[The remainder of § 5(b) provided for maintenance and production of records]. Material in brackets was deleted from § 5(b)(1) by P.L. 95-223, §§ 101(a), 102, 91 Stat. 1625 (Dec. 28, 1977).

III. THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT, 50 U.S.C. § 1702(a), PROVIDES IN PERTINENT PART:

(1) At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit—

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

(iii) the importing or exporting of currency or securities; and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest;

by any person, or with respect to any property, subject to the jurisdiction of the United States.

[The remainder of 50 U.S.C. § 1702(a) provided for maintenance and production of records and for release from liability.]

I. By resolution approved May 7, 1940, c. 185, § 1, 54 Stat. 179, § 5(b) of the Trading With the Enemy Act of October 6, 1917, 40 Stat. 411, was amended to read, in pertinent part:

During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by or to banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, and any transfer, withdrawal or exportation of, or dealing in, any evidences of indebtedness or evidences of ownership of property in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest, by any person within the United States or any place subject to the jurisdiction thereof; . . ..

[The remainder of § 5(b) provided for production of records.]

Appendix B — Pertinent Sections of TWEA for Which There Is No Counterpart in IEEPA.

I. SECTION 7 OF THE TRADING WITH THE ENEMY ACT, 50 U.S.C. APP. § 7, PROVIDES IN PERTINENT PART:

> (c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, chooses [sic] in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act [sections 1-6, 7-39 and 41-44 of this Appendix]. . . .
>
> The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act [sections 1-6, 7-39 and 41-44 of this Appendix], and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

II. SECTION 9 OF THE TRADING WITH THE ENEMY ACT, 50 U.S.C. APP. § 9, PROVIDES IN PERTINENT PART:

Claims to property transferred to custodian; notice of claim; filing; return of property; suits to recover; sale of claimed property in time of war or during national emergency

(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claim-

ant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act [sections 1-6, 7-39 and 41-44 of this Appendix], and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated: *Provided further*, That upon a determination made by the President, in time of war or during any national emergency declared by the President, that the interest and welfare of the United States require the sale of any property or interest or any part thereof claimed in any suit filed under this subsection and pending on or after the date

of enactment [Oct. 22, 1962] of this proviso the Alien Property Custodian or any successor officer, or agency may sell such property or interest or part thereof, in conformity with law applicable to sales of property by him, at any time prior to the entry of final judgment in such suit. No such sale shall be made until thirty days have passed after the publication of notice in the Federal Register of the intention to sell. The net proceeds of any such sale shall be deposited in a special account established in the Treasury, and shall be held in trust by the Secretary of the Treasury pending the entry of final judgment in such suit. Any recovery of any claimant in any such suit in respect of the property or interest or part thereof so sold shall be satisfied from the net proceeds of such sale unless such claimant, within sixty days after receipt of notice of the amount of net proceeds of sale serves upon the Alien Property Custodian, or any successor officer or agency, and files with the court an election to waive all claims to the net proceeds, or any part thereof, and to claim just compensation instead. If the court finds that the claimant has established an interest, right, or title in any property in respect of which such an election has been served and filed, it shall proceed to determine the amount which will constitute just compensation for such interest, right, or title, and shall order payment to the claimant of the amount so determined. An order for the payment of just compensation hereunder shall be a judgment against the United States and shall be payable first from the net proceeds of the sale in an amount not to exceed the amount the claimant would have received had he elected to accept his proportionate part of the net proceeds of the sale, and the balance, if any, shall be payable in the same manner

as are judgments in cases arising under section 1346 of Title 28. The Alien Property Custodian or any successor officer or agency shall, immediately upon the entry of final judgment, notify the Secretary of the Treasury of the determination by final judgment of the claimant's interest and right to the proportionate part of the net proceeds from the sale, and the final determination by judgment of the amount of just compensation in the event the claimant has elected to recover just compensation for the interest in the property he claimed. . . .

Appendix C — Identification of Parent, Subsidiaries and Affiliates of Chas. T. Main International, Inc. Pursuant to Supreme Court Rule 28.1.

PARENT

Chas. T. Main, Inc. (Chas. T. Main International, Inc. is wholly owned by Chas. T. Main, Inc., which is wholly owned by its employees).

SUBSIDIARIES

None

AFFILIATES

(All are wholly-owned subsidiaries of Chas. T. Main, Inc.)

Chas. T. Main of New York, Inc.
Chas. T. Main of Michigan, Inc.
Chas. T. Main of Virginia, Inc.
CTM Disc, Inc.
Chas. T. Main Canada, Inc.
Buerkell & Co., Inc.
Technical Service Co.
HPN Consultants, Inc.
Main Constructors, Inc.